

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MARK MACY,

Plaintiff,

vs.

SGT. POST, ALVIN FODE, and
KRISTY COBBEN,

Defendants.

CV 14-00018-DLC-RKS

FINDINGS AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE JUDGE

SYNOPSIS

Mr. Macy, a prisoner proceeding in forma pauperis, alleges he was denied toilet paper on three occasions over a period of less than two months in violation of the Eighth Amendment cruel and unusual punishment clause of the United States Constitution. (Complaint, Doc. 2-1.) He also alleges his Fourteenth Amendment due process right was violated. (Complaint, Doc. 2-1 at 1-2.) Mr. Macy's allegations fail to state a claim upon which relief may be granted. The Complaint should be dismissed.

JURISDICTION

Mr. Macy filed this action in federal court, in the Helena Division of the District of Montana. (Complaint, Doc. 2.) Venue is proper, as he was incarcerated

in and alleges wrongs committed in Powell County, Montana. Local Rule 3.2(b)(3). The Court has personal jurisdiction over the parties, all of whom are found in Montana. Fed. R. Civ. P. 4(k)(1)(A); Mont. R. Civ. P. 4(b). Read liberally, the Complaint attempts to allege a violation under 42 U.S.C. § 1983, invoking subject matter jurisdiction. 28 U.S.C. § 1331, 28 U.S.C. § 1343(a). The case was assigned to Hon. Dana Christensen, Chief United States District Court Judge, and referred to the undersigned. Local Rule 72.2(a)(1).

STATUS

Mr. Macy is a prisoner proceeding in forma pauperis. His Complaint must be reviewed to determine if the allegations are frivolous, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2)(B), 1915A. If so, the case must be dismissed. 28 U.S.C. §§ 1915(e)(2), 1915A(b). This is the review.

STANDARDS

Stating a claim

A complaint must allege sufficient factual matter to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plausibility is less than probability, but requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Pleadings that are no more than conclusions are not entitled to the presumption of truth and may be disregarded. *Id.* at 679. A plaintiff must plead the essential elements of a claim to avoid dismissal for failure to state a claim. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

Leave to amend

Mr. Macy, representing himself, is entitled to have his Complaint liberally construed. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987). “Unless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of the action.” *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

Leave for Mr. Macy to amend his complaint should be given freely “when justice so requires.” Fed. R. Civ. P. 15. A district court, however, should dismiss a complaint without granting leave to amend if amendments would be futile.

Klamath Lake Pharmaceutical Ass’n v. Klamath Medical Services Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983). “Leave to amend need not be given if a

complaint, as amended, would be subject to dismissal.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

Eighth Amendment

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII. The “cruel and unusual punishments” standard applies to the conditions of a prisoner’s confinement. *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981). “[T]he Constitution does not mandate comfortable prisons.” *Rhodes*, 452 U.S. at 349. Generally speaking, prison conditions rise to the level of an Eighth Amendment violation only when they “involve the wanton and unnecessary infliction of pain.” *Id.* at 347.

The Supreme Court has developed a two-part analysis to govern Eighth Amendment challenges to conditions of confinement. First, under the objective component, a prisoner must prove that the condition he complains of is sufficiently serious to violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). To satisfy this element “a prison official’s act or omission must result in the denial of ‘the minimal civilized measure of life’s necessities.’” *Farmer v. Brennan*, 511 U.S. 825 at 834 (1994) (citing *Rhodes*, 452 U.S. at 347).

Second, the prisoner must show that the prison officials “acted with a

sufficiently culpable state of mind” with regard to the condition at issue. *Hudson*, 503 U.S. at 8. The proper standard is that of deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

Fourteenth Amendment—Procedural Due Process

The Due Process Clause of the Fourteenth Amendment protects prisoners from being deprived of life, liberty, or property without due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). To state a cause of action for deprivation of procedural due process, a plaintiff must first establish the existence of a protected interest. Prisoners are entitled to due process protections when subject to disciplinary sanctions that implicate “a protected liberty interest—that is, where the conditions of confinement impose an ‘atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.’” *Brown v. Oregon Dept. of Corrections*, 751 F.3d 983, 987 (9th Cir. 2014) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). A litigant alleging a due process violation must first demonstrate that he was deprived of a liberty interest protected by the Due Process Clause and then show that the procedures attendant upon the deprivation were not constitutionally sufficient. *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 459–60 (1989).

A prisoner has no constitutional right to a favorable or effective grievance

procedure. *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (“inmates lack a separate constitutional entitlement to a specific prison grievance procedure”) (citation omitted); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (“There is no legitimate claim of entitlement to a grievance procedure.”) (citations omitted).

FACTUAL ALLEGATIONS

For purposes of this review, factual allegations in the Complaint are presumed to be true. Unsupported legal conclusions, however, are disregarded.

Mr. Macy alleges he was without toilet paper on three occasions over the course of several weeks. (Complaint, Doc. 2-1 at 2.) Mr. Macy filed a grievance, but he alleges Kristy Cobben delayed the response for five weeks and failed to process two grievances properly. (Complaint, Doc. 2-2 at 1.)

On November 13, 2013, the prison warden responded to Mr. Macy’s grievance appeal stating that adequate amounts of toilet paper would be made available at all times. (Complaint Exhibits, Doc. 2-4 at 10.)

ANALYSIS

Viewing the facts in the light most favorable to Mr. Macy, the Court finds that the denial of toilet paper on three occasions over the course of less than two months does not meet the objective test for cruel and unusual punishment. *See Lyons v. Skolnik*, 502 Fed.Appx. 712, 713 (9th Cir. 2013)(State prison’s policy of

providing inmates with only one roll of toilet paper per week, and requiring inmates to purchase extra toilet paper if they wished to exceed that allotment, did not amount to denial of minimal civilized measure of life's necessities, in violation of Eighth Amendment).

Because a prisoner has no constitutional right to a favorable or effective grievance procedure, Mr. Macy's due process claim likewise fails to state a claim upon which relief may be granted. Mr. Macy's allegations do not rise to the level of a constitutional violation.

CONCLUSION

Mr. Macy has failed to state a claim upon which relief may be granted. These are not defects which could be cured by the allegation of additional facts. The Complaint should be dismissed.

“Strike” under 28 U.S.C. § 1915(g)

The Prison Litigation Reform Act prohibits prisoners from bringing forma pauperis civil actions if the prisoner has brought three or more actions in federal court that were dismissed for frivolousness, maliciousness, or for failure to state a claim. 28 U.S.C. § 1915(g). Because Mr. Macy failed to state a claim, the dismissal of this matter should be a strike under 28 U.S.C. §1915(g).

Certification Regarding Appeal

The Federal Rules of Appellate Procedure provide as follows:

[A] party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:
(A) the district court-before or after the notice of appeal is filed-certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding;

Fed.R.App.P. 24(a)(3)(A).

Analogously, 28 U.S.C. § 1915(a)(3) provides “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” The good faith standard is an objective one. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962). A plaintiff satisfies the “good faith” requirement if he or she seeks review of any issue that is “not frivolous.” *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977) (*quoting Coppedge*, 369 U.S. at 445). For purposes of Section 1915, an appeal is frivolous if it lacks any arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1225 (9th Cir. 1984).

The record makes plain the instant Complaint is frivolous as it lacks arguable substance in law or fact. As such, no reasonable person could suppose an appeal would have merit. The Court should certify that any appeal of this matter

would not be taken in good faith.

Address Changes

At all times during the pendency of this action, Mr. Macy must immediately advise the Court of any change of address and its effective date. Failure to file a notice of change of address may result in the dismissal of the action for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

It is **RECOMMENDED:**

1. Mr. Macy's Complaint (Doc. 2) should be dismissed.
2. The Clerk of Court should be directed to close this matter and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.
3. The Clerk of Court should be directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g). Mr. Macy failed to state a claim upon which relief may be granted.
4. The Clerk of Court should be directed to have the docket reflect that the Court certifies pursuant to Fed.R.App.P. 24(a)(3)(A) that any appeal of this decision would not be taken in good faith. The record makes plain the instant Complaint is frivolous as it lacks arguable substance in law or fact.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

Mr. Macy may file objections to these Findings and Recommendations within fourteen (14) days after service (mailing) hereof.¹ 28 U.S.C. § 636. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed.R.App.P. 4(a), should not be filed until entry of the District Court's final judgment.

DATED this 17th day of November, 2014.

/s/ Keith Strong
Keith Strong
United States Magistrate Judge

¹As this deadline allows a party to act after the Findings and Recommendations is "served," it falls under Fed.R.Civ.P. 6(d). Therefore, three (3) days are added after the period would otherwise expire.